No. 9274

In the United States Circuit Court of Appeals for the Ninth Circuit

STAR POINTER EXPLORATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

JOHN B. TANSIL,
United States Attorney,
District of Montana.

C. R. DENNY,
NORMAN MacDONALD,
ELY MAURER,
Attorneys, Department of Justice,
Washington, D. C.

INDEX

	Page
Opinion below	1
Question presented	1
Rule of Court involved	2
Statement	2
Argument	5
The order denying intervention rested in the discretion of the district court and therefore is not appealable	5
Appellant has no right to intervene because it lacks requisite interest in the subject matter of the suit	5
Appellant's claim of inadequacy of representation is without merit	7
Appellant's contention that its claim and the main action have a question of law in common is also without merit	9
Conclusion	11
Appendix	13

CITATIONS

Cases:	
Chandler Co. v. *Brandtjen*, 296 U. S. 53	7
Credits Commutation Co. v. *United States*, 177 U. S. 311	5, 6, 7
Demulso Corporation v. *Tretolite Corporation*, 74 F. 2d 805	6, 9
Ex parte Cutting, 94 U. S. 14	5
Farmers' & Merchants' Bank v. *Arizona M. S. & L. Ass'n.*, 220 Fed. 1	5
Glass v. *Woodman*, 223 Fed. 621	7
Radford Iron Co. v. *Appalachian Electric Co.*, 62 F. 2d 940	6, 7
Richfield Oil Co. v. *Western Machinery Co.*, 279 Fed. 852	8, 10
State of Washington v. *United States*, 87 F. 2d 421	6, 8, 10
United States v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116	7
Statutes and Rules of Court:	
Act of July 2, 1864, c. 217, 13 Stat. 365	3, 10, 11
Act of March 3, 1875, c. 152, 18 Stat. 482	2, 3, 4, 10, 11
Act of May 21, 1930, c. 307, 46 Stat. 373	2, 4
Federal Rule of Civil Procedure 24:	
Subdivision (a) (2)	2, 3, 7, 9
Subdivision (b) (2)	2, 3, 9
Texts:	
Moore, Federal Practice (1938), sec. 24.07, p. 2333	8

196138—39

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9274

STAR POINTER EXPLORATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not file an opinion. The order denying intervention, which was made and entered in open court, will be found in the record at pp. 26–29.

QUESTION PRESENTED

Whether in a suit by the United States to enjoin the removal of minerals underlying a railroad right-of-way a company claiming minerals underlying the right-of-way of another railroad has an interest in the subject matter of the suit entitling it to intervene as of right.

RULE OF COURT INVOLVED

Rule 24 of the Federal Rules of Civil Procedure, which relates to intervention, is printed in full in the Appendix, *infra,* pp. 13–14.

STATEMENT

In this suit, the United States seeks to enjoin the Great Northern Railway Company from drilling for or removing the oil and other minerals beneath the right-of-way granted to its predecessor under the Act of March 3, 1875, c. 152, 18 Stat. 482 (R. 6). The bill of complaint alleges that a portion of this right-of-way crosses certain designated sections of land all of which are in Glacier County, Montana (R. 4); that the Great Northern claims to own the underlying oil and minerals, and has threatened to drill for and remove them (R. 4); that the Great Northern and its predecessor did not acquire any right or interest in the oil and minerals by virtue of the Right of Way Act of March 3, 1875 (R. 5); that they remained the property of the United States (R. 4); and that the Great Northern has not obtained a lease to drill for and remove them pursuant to the Act of May 21, 1930, c. 307, 46 Stat. 373, or applied for such a lease (R. 5). In its answer, the Great Northern Railway Company admits that it intends to drill for and remove the oil and minerals, asserts that it owns them, and denies that the United States owns them (R. 7–10).

Star Pointer Exploration Company filed a motion and petition for leave to intervene (R. 13–20). It alleged that it is the successor to the patentees of certain land in Granite County, Montana, which is traversed by the

right-of-way of the Northern Pacific Railway Company which was granted under the Act of July 2, 1864, c. 217, 13 Stat. 365,[1] and as such owns[2] minerals beneath the Northern Pacific right-of-way (R. 15); that neither the United States nor the Great Northern owns the minerals beneath the Great Northern right-of-way, but that they belong to the patentees of the land crossed by the right-of-way (R. 16); that Rule 24 (a) (2) of the Federal Rules of Civil Procedure provides for intervention of right in suits where an applicant's interest is or may be inadequately represented and the applicant is or may be bound by the judgment, and Rule 24 (b) (2), for permissive intervention where the applicant's claim or defense and the main action have a question of law or fact in common (R. 16–17); that its interest is adverse to the United States and will not be represented, and that any attempted representation of its interest by the United States will be inadequate and it may be bound by the judgment (R. 17); that the question of law in the suit is whether the United States, the Great Northern, or the patentees of land traversed by the Great Northern right-of-way own the minerals thereunder (R. 18); that the suit ought not to be determined without a consideration of the rights of the class of property owners which it represents (R. 18); that its application to in-

---

[1] The petitioner alleged that the Northern Pacific right-of-way was granted "under the Acts of July 2, 1864, and March 3, 1875, and Acts supplementary thereto and amendatory thereof" (R. 15, 22). However, the reference to the Act of "March 3, 1875, and Acts supplementary thereto and amendatory thereof" is plainly incorrect.

[2] From Star Pointer Exploration Company's proposed bill of complaint, it appears that part of the land is under lease by the company (R. 23).

tervene ought to be granted because it is without authority to litigate or quiet its title against the United States to the minerals beneath the Northern Pacific right-of-way in an independent suit (R. 20).

Thereafter, Star Pointer Exploration Company filed a proposed complaint in intervention, which is designated "Intervention Pro Interesse Suo" (R. 21–25). It further alleges therein that the United States claims ownership of the minerals underlying the Northern Pacific right-of-way and asserts the right to enter upon the right-of-way and dispose of the minerals through its agents and lessees under the Act of May 21, 1930, c. 307, 46 Stat. 673 (R. 24); that the Great Northern claims to own and has threatened to remove the minerals underlying the Great Northern right-of-way (R. 24); and that any such removal of minerals by either the United States or the Great Northern constitutes a violation of the Right of Way Act of March 3, 1875, and will deprive it of its property (R. 24–25). It prayed that the complaint of the United States be dismissed (R. 25).

After a hearing, the district court denied the motion and petition for leave to intervene (R. 27–28), and Star Pointer Exploration Company has appealed from that order (R. 60–61).

Raymond MacDonald, Trustee, also filed a motion and petition for leave to intervene (R. 30–38). He alleged that he is a trustee for patentees of land in Glacier County, Montana, which is traversed by the Great Northern right-of-way, and as such trustee owns minerals beneath the Great Northern right-of-way (R. 30–38). The district court tentatively granted his motion and petition, and tentatively overruled the Gov-

ernment's contention that the motion and petition constituted a cross-bill against the United States upon which it had not consented to be sued (R. 28).

ARGUMENT

The order denying intervention rested in the discretion of the district court and therefore is not appealable

This appeal is predicated upon the theory that appellant had a right to intervene which was denied by the district court, and that the order denying intervention is therefore appealable (Br. 2–3, 18). It will be shown that appellant had no grounds for intervention as of right. It follows that appellant's application to intervene was addressed to the discretion of the district court and that the order denying intervention is therefore not appealable. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Ex parte Cutting,* 94 U. S. 14, 22 (1876); *Farmers' & Merchants' Bank* v. *Arizona M. S. & L. Ass'n.,* 220 Fed. 1, 7 (C. C. A. 9, 1915).

Appellant has no right to intervene because it lacks requisite interest in the subject matter of the suit.— Appellant's claim of right of intervention (Br. 2–3, 8, 18) fails because it does not have a direct interest in the minerals underlying the Great Northern right-of-way, which are the subject matter of the suit. It does claim to own minerals which underlie the *Northern Pacific* right-of-way, but those minerals are not involved in this suit and will not be affected by the judgment.[3] Since

[3] Appellant appears to contend that it represents a class of patentees (Br. 5, 7, 26). However, it is not a member of the class of patentees along the Great Northern right-of-way and therefore cannot represent them. Moreover, it would avail appellant nothing to represent a class of patentees along the Northern Pacific right-of-way because that class has no greater rights than appellant itself.

appellant has no direct interest in the subject matter of the suit and its rights, if any, in minerals beneath the *Northern Pacific* right-of-way will not be affected by the judgment, its contention that it has no adequate relief due to its inability to sue the United States in an independent suit fails. For it is obvious that appellant has not shown any need for relief, and therefore that *State of Washington* v. *United States,* 87 F. (2d) 421, 434 (C. C. A. 9, 1936), principally relied upon by it, is inapplicable. The *State of Washington* case has application where the intervenor has a direct interest in the subject matter of the suit, and even then only where the judgment will affect the intervenor's interest.

Also, appellant's further contention (Br. 16–17), that it may be prejudiced unless allowed to intervene because the judgment may be a precedent adverse to its claim to minerals beneath the Northern Pacific right-of-way, is unsubstantial. The mere possibility of an adverse precedent does not vest an attempted intervenor with any interest in the subject matter of a suit which requires that he be granted intervention as of right. *Demulso Corporation* v. *Tretolite Corporation,* 74 F. 2d 805, 808 (C. C. A. 10, 1934); cf. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Radford Iron Co.* v. *Appalachian Electric Co.,* 62 F. 2d 940, 942 (C. C. A. 4, 1933).

Appellant by its motion and petition for leave to intervene has simply attempted to introduce into the main suit an entirely unrelated claim. It is well settled that an attempted intervenor will not be permitted thus to broaden the scope of the litigation between the

original parties to the suit. *Chandler Co.* v. *Brandtjen,* 296 U. S. 53, 57–58, 59 (1935); *Glass* v. *Woodman,* 223 Fed. 621, 622–623 (C. C. A. 8, 1915).

Appellant's claim of inadequacy of representation is without merit.—Rule 24 (a) (2) of the Federal Rules of Civil Procedure, which is controlling in the case of a claim of this nature, reads:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *.

The rule refers to the "applicant's interest" without defining the nature of the interest required. It is largely, however, a codification of the requirements for intervention of right laid down in the prior decisions, Federal Rule of Civil Procedure 24 and Notes thereto. It is therefore certain that the interest required by the rule is an interest which has a direct connection with the subject matter of this suit, *United States* v. *Columbia Gas & Electric Corp.,* 27 F. Supp. 116, 120 (Del. 1939), such as was required for intervention of right under the prior decisions. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315–316 (1900); *Radford Iron Co.* v. *Appalachian Electric Power Co.,* 62 F. 2d 940, 942 (C. C. A. 4, 1933). Here appellant's claim of interest (R. 15, 23; Br. 6, 7) has no direct connection with the subject matter of the instant suit, which is the minerals beneath the Great Northern right of way.

Therefore, no question as to representation—much less as to inadequacy of representation—of appellant's

interest in the suit or as to appellant being bound by the judgment could properly arise.

It may be noted, however, as appellant points out in its petition for leave to intervene (R. 17) and in its brief (p. 7), that the United States does not represent any interest of appellant. It asserts (R. 4) a claim of right to the minerals beneath the Great Northern right-of-way purely in its own behalf. In those minerals, appellant has no interest to be asserted by anyone in this suit. Even assuming it had, the United States would still be asserting a claim of interest purely in its own right and not in the right of appellant. Although in that case appellant might apply to intervene, it could not apply for intervention of right on the ground that its claim of interest is represented by the United States. It would have to apply for intervention on other grounds, as for example that its claim and the main suit have a question of law in common. Even then, unless the judgment would be *res judicata* as to it, Moore, Federal Practice (1938) sec. 24.07, p. 2333, or would directly bind its rights in the subject matter of the suit, cf. *State of Washington* v. *United States,* 87 F. 2d 421, 434 (C. C. A. 9, 1936); *Richfield Oil Co.* v. *Western Machinery Co.,* 279 Fed. 852, 855 (C. C. A. 9, 1922), it would not be entitled to intervene as of right.

It may be noted further, as to appellant's contention that it will be bound by the judgment (Br. 16–17), that it does not contend that the judgment will be *res judicata* as to it, or even that the injunction sought, if granted, will affect its rights in the minerals beneath the Northern Pacific right-of-way. It contends that

it will be bound by the judgment only in the sense that the judgment may be a precedent adverse to its interests. No case has been found where an attempted intervenor has been held to be "bound" by the judgment under such circumstances. In the one pertinent case that has been found it was held that an attempted intervenor was not bound by the judgment under such circumstances. *Demulso Corporation* v. *Tretolite Corporation,* 74 F. 2d 805, 808 (C. C. A. 10, 1934). There would therefore seem to be no justification to grant appellant intervention as of right merely because of its inability to overcome the precedent by an independent suit against the United States, especially since it would mean, in every case in which an attempted intervenor's claim has a question of law in common with a main suit by the United States that he must be allowed to intervene as of right. In effect, a clearly unwarranted broadening of Rule 24 (a) (2) would result and an additional type of intervention of right for which the rule makes no provision would be created.

Appellant's contention that its claim and the main action have a question of law in common is also without merit.—Rule 24 (b) (2) of the Federal Rules of Civil Procedure reads:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As is plainly indicated, intervention under this rule rests in the discretion of the district court. Hence, as has been stated earlier, *supra,* pp. 5–6, unless appellant has a direct interest in the subject matter of the suit which may be affected by the judgment it cannot claim to intervene as of right merely because its claim and the main suit have a question of law in common. Cf. *State of Washington* v. *United States,* 87 F. 2d 421, 434 (C. C. A. 9, 1936); *Richfield Oil Co.* v. *Western Machinery Co.,* 279 Fed. 852, 855 (C. C. A. 9, 1922). It has already been shown, *supra,* pp. 5–6, that appellant has no such interest in the subject matter of the suit. Hence, insofar as intervention was sought on the ground of a common question of law, the order denying intervention rested in the discretion of the district court.

It may be noted, however, contrary to appellant's contention (Br. 18–19), that actually appellant's claim and the main suit do not have a question of law in common. The question of law in this suit will turn primarily upon the proper construction of the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, under which the Great Northern right-of-way was granted. The question of law appertaining to appellant's claim to minerals under the Northern Pacific right-of-way will depend principally upon the proper construction of the Act of July 2, 1864, c. 217, 13 Stat. 365, under which the Northern Pacific right-of-way was granted. The fact that each question of law requires construction of a different Act means in itself that there are two distinct

and separate questions of law involved. This is especially true where as in this case the two Acts differ vitally in their terms. The Act of 1875, as appellant points out with emphasis (Br. 10), provides that "all such lands *over which* such right-of-way shall pass shall be disposed of *subject* to such right-of-way," but the Act of 1864 provides (sec. 6) that the homestead and preemption laws shall be extended to all lands within the Northern Pacific grant (secs. 2, 3) other than the odd sections, "*excepting* those hereby granted to said company." (Italics supplied.) The rights of patentees along the Great Northern right-of-way, therefore, may be quite different than those of patentees along the Northern Pacific right-of-way.

That the district court's denial of intervention was an exercise of a wise discretion is evident. The granting of intervention would compel the United States to litigate not only the issue of the rights of the original parties under the Right of Way Act of March 3, 1875, c. 152, 18 Stat. 482, but also the entirely separate issue as to the relative rights of the United States and appellant to minerals under the right-of-way granted by the Act of July 2, 1864, c. 217, 13 Stat. 365, which is not involved in the suit. If the discretion of the district court were to be exercised in appellant's favor, many others in appellant's situation, as well as patentees along the many railroad rights-of-way granted by the United States, might with equal claim upon the favorable discretion of the district court seek to intervene.

CONCLUSION

It has been shown that appellant had no right to intervene, and that the order denying intervention

rested in the discretion of the district court. It is therefore respectfully submitted that the appeal should be dismissed.

NORMAN M. LITTELL,
Assistant Attorney General.
JOHN B. TANSIL,
United States Attorney,
District of Montana.
C. R. DENNY,
NORMAN MACDONALD,
ELY MAURER,
Attorneys, Department of Justice,
Washington, D. C.

DECEMBER 1939.

APPENDIX

Rule 24 of the Federal Rules of Civil Procedure provides as follows:

> (a) INTERVENTION OF RIGHT.—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.
>
> (b) PERMISSIVE INTERVENTION.—Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) PROCEDURE.—A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same pro-

cedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754, § 1.

U. S. GOVERNMENT PRINTING OFFICE: 1939